formulate reasons for detention which will not reveal sensitive information such as the identity of informers. Furthermore, even though there may be instances in which security demands the complete isolation of detainees, this is only in extreme cases and for short periods such as when the security forces have arrested a member of a terrorist group and wish to crack down on the others before the news of their colleague's arrest reaches them. Such a limited need for isolation hardly justifies the blanket prohibition on access to lawyers without official permission which the appeal court validated in *Omar*. One wonders whether the majority judges are familiar with the many studies of secrecy in government which show how commonly it is employed to conceal the misuse of power, mismanagement, corruption, inefficiency and the like; and how little relevance it may have to the asserted objective of protecting truly sensitive information. Certainly, there is sufficient evidence of the misuse of secrecy in South Africa to caution against judicial extension of its ambit.

The preceding political analysis of the *Omar* ruling should be sufficient to dispel any aura of enigma that surrounds the case. The litigant Omar was finally thwarted by a majority of oumas[4] in Bloemfontein. And as Samuel Johnson would have said 'there's an end on it, Sir!'

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4 The word 'ouma' means grandmother in Afrikaans.

A JUDICIAL DECLARATION OF MARTIAL LAW

The South African judiciary is an enigma. Its jurisdiction has been emasculated by wave upon wave of hostile legislation, its composition is almost exclusively confined to those drawn from the ruling class, it relies for its survival upon little more than the slender threads of common-law jurisdiction and statutory independence. It might long ago have degenerated into a compliant auxiliary of the other branches of government. At times this appears to have happened.

Yet many South African judges have recently demonstrated that the judicial spirit was not yet extinguished. Judicial activism to protect individual rights has taken place in the face of draconian security legislation and two states of emergency. Judges have ordered detained opponents of apartheid to be released to their joyous crowds of supporters. A bewildered government wondered why its legislative draughtsmen couldn't get things right; equally bewildered foreign media, which thought such activism possible only under a bill of rights, suddenly found itself briefly able to report once more on the events occurring within the townships. Surprised observers wondered how long this activism could continue.

The Appellate Division in *Omar v Minister of Law and Order* 1987 (3) SA 859 (A) may have provided the answer. Acting Chief Justice Rabie and

his three silently concurring brothers (Joubert and Viljoen JJA, and Boshoff AJA; Hoexter JA partially dissenting) upheld emergency regulations and rules promulgated under the Public Safety Act 3 of 1953 that authorized the administrative extension, without a hearing, of the detention of persons already detained, and that prohibited access by detainees to any persons (including legal advisers and representatives) except with the permission of the Minister of Law and Order or the Commissioner of Police. In this decision the court has secured for the government an executive carte blanche that was neither obviously contemplated by the Public Safety Act itself nor justified under the South African constitutional tradition, tattered though this tradition may have become. The decision is a political and legal disaster for South Africa, for South African lawyers and, above all, for the victims of apartheid. Its significance extends far beyond the particular issues that were in dispute before the court.

To view the *Omar* decision in its full context, we should recall the general and special responsibilities of the South African judiciary. The Supreme Court is grounded in the Western, triadic notion of government. In an unstable though reasonably satisfactory accommodation, superior courts have had to respect the choices made by elected legislatures whilst simultaneously reviewing the actions of officials mandated by these legislatures in order to determine whether their mandates have been properly executed. Legislatures, even 'sovereign' ones, have acquiesced because they have had little option. They cannot enact self-executing statutes, nor can they formulate legislation of self-evident meaning; hence the official interpretation and application of legislation in concrete circumstances has had necessarily to be policed by the courts.

In practice, the courts have become 'partners' in the legislative and administrative process. They have had to identify the implicit guidelines that lurk within the skeletal frameworks of governing statutes so as to provide meaningful criteria by which the ultimate lawfulness of official conduct is to be assessed. They have had to invoke, as guides for construing vague legislation, traditional legal standards of rationality and fairness in order to make sense of what would otherwise be vacuous statutory verbiage. This has involved them in the delicate and arduous task of drawing boundaries between relevant and irrelevant decisional considerations, proper and improper purposes for official conduct, and fair and unfair administrative procedures. And where democracy has not yet emerged, or where it is only partial, as in South Africa, the duty of the judiciary has been even more onerous because the 'representative' nature of legislation and official policy is often non-existent or extremely dubious. This has suggested an enlarged judicial role. As Laurence Boulle recently observed, the special South African circumstances constitute an 'inversion factor' that tends to change the ground rules in South African public law (Laurence Boulle 'Elements in the Crucible: Developing Public Law for the Future' (1987) 104 *SALJ* 104).

How were these responsibilities discharged in *Omar*? Given the broad

and vague terms of ss 2 and 3 of the Public Safety Act, it has to be conceded that they are not easy ones to discharge. Throughout his judgment, Rabie ACJ emphasized the breadth of the powers conferred upon the State President: they are 'most extensive' (at 892B-C), and 'extremely wide' (at 900I-J). They have been delegated by Parliament for use in situations when 'the ordinary law of the land is inadequate to enable the Government to ensure the safety of the public, or to maintain public order' (Act 3 of 1953, s 2(1)(c)). Hence, the Acting Chief Justice observed, '[t]his indicates that Parliament contemplated that the need to ensure the safety of the public or to maintain public order might necessitate the taking of extra-ordinary measures which might make drastic inroads into the rights and privileges normally enjoyed by individuals' (at 892A-B).

Quite so! Whatever we might think of Parliament's strategy in resorting to so sweeping a delegation of power for resolving the problems of the country, the Act is what the judges have to work with. But the conclusion does not automatically follow that the traditional role of the courts in judicial review has thereby been terminated. On the contrary, it is much more compatible with modern notions of judicial review, and not at all in conflict with the dogma of parliamentary sovereignty, to assume that the role of the courts as supplementary watchdogs over the executive should in such circumstances automatically be *intensified*, particularly where democratic checks are lacking and where civil liberties are in jeopardy.

Parliament conferred powers to be invoked when the '*ordinary law* of the land is inadequate'. What Parliament did *not* do was displace the *ordinary legal system* (including the system of administration of justice), which contemplates the judicial scrutiny of the legality of the State President's measures. Parliament merely used a technique now familiar in many other areas of law, namely the broad delegation of power to administrative officials. It is true that in so doing Parliament displayed considerable faith in the judgment of its delegees, but this does not imply that it also expected the delegees to be unaccountable to the courts for the *unlawful* exercise of the delegated power. (Even in *Omar* the court considered it unnecessary to evaluate the effect of the new s 5B, which purports to oust the jurisdiction of the courts (at 904C). As cases such as *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) illustrate, such clauses are ineffective in precluding the discharge of the courts' ordinary review (as opposed to appellate) functions.)

Throughout his 16-page judgment, Rabie ACJ had many opportunities to develop a construction of the Public Safety Act that would have provided guidance and structure for the rational exercise of the powers it conferred. (A few of these possibilities were indeed pursued by Hoexter JA in his partial dissent.) This would, of course, have been detested by the government, but such is the price that sometimes has to be paid for civilized administration; that is why we have courts and judicial review. Through a combination of stark literalism and summary assertion, however, Rabie ACJ effectively eliminated the serious possibility of judging the legality of governmental action under the state of emergency.

He did so by simply equating the complex legal concept of the *intention* of the Act with the *ambitions* of the government.

The court made no serious endeavour to apply traditional principles of statutory interpretation. This is most apparent when it dealt with the applicability of the audi alteram partem maxim. Few maxims are as deeply entrenched as this: it is, moreover, flexible enough to be modified according to the exigencies of each situation. Yet the court readily construed the total silence of the Public Safety Act in this regard as implying authority on the part of the State President to exclude a right to a hearing *in any form whatsoever*. Though he conceded that this was 'not a view which one should lightly entertain' (at 900H-I), Rabie ACJ had no difficulty in adopting this interpretation 'when regard is had to the extremely wide powers . . . which the Act confers on the State President' (at 900J). This begs the very question in issue, which is: do these powers, wide as they *appear*, include the power to exclude an important legal principle not referred to in any way by the Act? The question can be answered only by a careful application of the principles of statutory construction in which, as Hoexter JA observes in his dissent, he who seeks to establish the power to disregard a fundamental legal right bears the burden of demonstrating that this was the express or necessary intention of the Act (dissent, at 907D-E).

The purposive aspect of statutory construction also received short shrift. Rabie ACJ appeared to recognize that powers are not delegated unreservedly because he spoke, as he had done in *State President v Tsenoli* 1986 (4) SA 1150 (A) at 1183-4), of there being limits to the powers being exercised under the Act and emergency regulations. When referring to the power of the State President to make emergency regulations he said that though the State President is to exercise 'subjective' judgment, '[t]his does mean, of course, that the exercise by the State President of the powers . . . is immune from attack' (at 892G). He observed, when speaking of the Minister's power to grant or refuse access by legal advisers to their detained clients, that it must 'be taken to be implied that leave can be refused only on grounds which are related to the emergency' (at 896I-J).

This is surely correct: in the absence of parliamentary suicide the powers conferred must have some limits. But the Acting Chief Justice does not seem to believe that those limits are really *legal* limits, for whenever he was confronted by the possibility that they had been exceeded, he offered no independent construction of the legislation. As in *Tsenoli* itself he relied instead upon the autistic construction by the State President and his ministers of the extent of their own powers. Counsel's contention that a regulation was 'ultra vires because it was unrelated to the tenor and policy of the Act, and served none of the purposes mentioned in . . . the Act' was rejected, the Acting Chief Justice observing that 'the Act confers upon [the State President] the power to decide on the means and methods to be adopted to achieve the said purposes' (at 892I). This again begs the question. (Would it have been acceptable if the State President had decided that the best 'means and methods' to be adopted to ensure the

safety of the public or the maintenance of public order was to incarcerate every Jewish female under the age of fifty?) Nor was the analysis advanced by his conclusory assertion: 'Furthermore, and in any event, I do not think it can be said that reg 3(3) is not related to the said purposes' (at 892I-J).

Mere assertion sufficed elsewhere as well. The following are examples. 'It cannot in my opinion be said that the regulation is not related to the purposes mentioned in the section, and I do not agree with the submission' (at 895C). 'As to the question of reasonableness, also, I find myself unable to accede to the argument that reg 3(10)(a) and rule 5(1) are so unreasonable that they cannot be held to have been authorized by the Act' (at 897G). 'I do not agree with this submission [that the power to 'regulate' the detention of persons does not include the power to exclude their legal right to legal representatives]. The Minister of Justice has the power to regulate the detention of persons, and this includes, in my view, the power to regulate access to persons in detention' (at 897H-I). With these summary remarks, the Acting Chief Justice avoided serious consideration either of the application of the statute to the circumstances in question or of the complex bodies of law which have evolved around the issues raised.

Rabie ACJ conceded that the State President is at least required to 'apply his mind to whatever matter may be in issue, that he must act *bona fide* and that he must exercise the powers conferred on him ... for the purposes mentioned' (at 892G-H). But we soon discover that this is an empty concession. When asked to consider, as a measure of whether the State President might have exceeded the limits of his power, that there was a spectrum of alternative courses of action the latter might have less arbitrarily adopted, the Acting Chief Justice found himself unable to engage in any form of scrutiny: 'This may, or may not, have been feasible. I do not know. It may even be that the State President and the Minister of Justice considered measures of the kind suggested but decided against them on the ground that they would be impracticable .... [T]he court cannot substitute its view of what measures would be necessary or expedient for that of the State President' (at 897E-G). Nor, apparently, can the court even assure itself that the State President and Minister made the effort. (Contrast the approach of Mr Justice Hoexter who, in his dissent, took into account the common-law context within which the emergency legislation has been enacted and built upon the wording and structure of the legislation a confining framework within which the emergency powers must be exercised. This is much more akin to the modern approach to judicial review of executive action.)

The court was not entirely oblivious to the need to consider the reasoning processes of the administrative agent. When dealing with the total exclusion of any right on the part of a detainee to a hearing before the extension of his detention, Rabie ACJ quoted from the State President's affidavit (at 893I-J), apparently to determine whether the latter 'did not properly apply his mind to the matter in issue, or that he had regard to improper or irrelevant considerations, or that he acted with gross unreasonableness' (at 894A-B) (factors which regularly constitute the basis

for setting aside official action in South African administative law). He noted that the State President had realized that his action might lead to unnecessary action in 'individual cases' (at 894B), but he then devised speculative reasons why the State President might nevertheless have proceeded to impose a total prohibition. The State President might, he thought, have decided to 'avoid all danger' (at 894F) by adopting the most drastic course of action possible. Later in the judgment (at 895-6), the State President's reasons for placing the right of access by detainees to their legal advisers in the discretionary grant of officials are quoted at great length. Though the right of access to one's legal adviser has been regarded as 'fundamental' (see eg *Mandela v Minister of Prisons* 1983 (1) SA 938 (A) at 957D), and was nominally recognized as such by Rabie ACJ (*Omar* at 894-5), these 'reasons' are simply accepted by the court without any critical analysis whatever. When it is pointed out by counsel that the detainees 'may urgently require access to their legal advisers for a variety of reasons unrelated to their detention or the emergency', the Acting Chief Justice's response is a sanguine reassurance that it is 'not to be supposed that the Minister or the Commissioner of Police may, or will, refuse leave for the necessary access on just any ground whatsoever' (at 896H-I). Would his court held if they did? Would it have made any difference *what* the State President had said?

The South African government, ever since the 'constitutional crisis' of the 1950s, has resented the restraints that a system of independent courts impose. It has been unable to do without them, because in a sophisticated economy they are perhaps a functional necessity (if only for the plausible and predictable adjudication of disputes between those who keep the economy going). Fearing the danger to its designs that an independent judiciary continually consistutes, the government has many times resorted to Parliament for legislative protection from judicial review, the Public Safety Act providing one of the more obvious examples. Yet, for all its paranoia, it has never dared go so far as to impose an executive 'state of siege' — that extreme form of martial law which Dicey described as 'the suspension of ordinary law and the temporary government of the country ... by military tribunals', something he asserted to be 'unknown to the law of England' (A V Dicey *An Introduction to the Study of the Law of the Constitution* 10 ed (1959) 287).

With decisions like *Omar*, the government need no longer be apprehensive. Nowhere in the majority judgment does the court assert an independent role; instead we are treated to a lengthy, uncritical explanation of the point of view of the South African government. Rabie ACJ does not seem concerned with the responsibility of the *courts* at all. He has simply erased them from the picture.

Omar is, in effect, a judicial declaration of martial law in its most severe form.

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